

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Case No. 2013-CP-40-02443
Appellate Case No. 2016-000667

Timothy E. Bookert, Jr.,

Respondent,

v.

South Carolina Department of
Mental Health, and South
Carolina Treasurer's Office,

Appellants.

INITIAL BRIEF OF APPELLANTS

June 24, 2016

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

1. The trial court erred when it denied Appellant's JNOV and New Trial Motion where the overwhelming evidence shows a bailment never existed between Respondent and the fictional Aaron Kennedy and where all of Respondent's claims required proof of the existence of a bailment.
2. The trial court erred in its prejudicial hearsay ruling that allowed Respondent to testify about the amount of the money in controversy where Respondent admitted he had no personal knowledge as to the amount of money.
3. The trial court erred in enforcing a verdict that will result in Respondent's unlawful possession of the funds at issue.
4. The trial court erred in excluding Appellants' requested jury charges where there was sufficient evidence to create an inference that Respondent violated state and federal tax statutes through his possession of the funds at issue.
5. The trial court erred in failing to grant a new trial where Respondent's counsel told the jurors in closing argument that if the jury issued a verdict in favor of Appellants, the Appellants would "go out in that parking lot after this is all over and high five each other and say you know we pulled one over on that jury" where counsel immediately objected and had put the Court on notice prior to closing of the likelihood of Respondent making prejudicial statements in closing argument.

STATEMENT OF THE CASE

On April 23, 2013, Respondent Timothy E. Bookert, by and through his attorney, filed a civil suit against the South Carolina Department of Mental Health (“DMH”) and the South Carolina Treasurer’s Office, alleging the state agencies had committed trover and conversion, tortious interference with contract, breach of implied constructive bailment, and tortious interference with personal chattels against Respondent such that Respondent was entitled to a sum of \$208,700 in damages. The complaint also sought punitive damages, costs, and any further relief the Court deemed just and proper. The State filed its Answer on May 24, 2013, denying Respondent was entitled to the requested relief by responding to the factual allegations and asserting that the complaint should be dismissed for failure to state facts sufficient to constitute a cause of action, that the claims were barred by the equitable doctrine of unclean hands, that the claims were barred to the extent the funds were acquired through illegal activities or to the extent the bailment contract was illegal, that there were no damages in the case, that the claims were barred by the provisions of the South Carolina Tort Claims Act, that the punitive damages and prejudgment interest were barred by the South Carolina Tort Claims Act, that Respondent was estopped from bringing these claims because he acquiesced to possession by DMH, and that the claims were barred because Appellants had at all time acted in good faith.

Through discovery, the parties exchanged documents and answers to interrogatories relevant to these claims and defenses. In addition, Appellants took the deposition of Respondent.

Following discovery, both parties filed cross motions for summary judgment, Appellants filed a motion to compel, and Respondent filed a motion for spoliation of evidence. On June 5,

2014, the motions came before the circuit court, the Honorable Alison Renee Lee, for oral argument. On March 26, 2015, the circuit court entered an order denying Respondent's motion for spoliation of evidence, denying the cross motions for summary judgment, and granting in part Appellants' motion to compel. The parties proceeded to trial on November 30, 2015, before a jury and the Honorable Alison Renee Lee. On December 3, 2015, the jury returned a verdict in favor of Respondent in the amount of \$208,700. Appellants filed a timely motion for judgment notwithstanding the verdict ("JNOV") pursuant to Rule 50(b), or, in the alternative, Motion for a New Trial Absolute pursuant to Rule 59, SCRCP. On February 24, 2016, the trial court denied that motion, and Appellants received written notice of the entry of the Order on February 29, 2016. Appellants filed their Notice of Appeal on March 29, 2016.

STATEMENT OF THE FACTS

On April 25, 2011, an employee with the South Carolina Department of Mental Health found two small cardboard boxes filled with \$208,700 in cash in a storage room on the C.M. Tucker Campus of DMH. (Tr. p. 78, ll. 6-18; p. 82, ll. 1-3; Court's Ex. 3, Defense Ex. 3.) The employee alerted his supervisor about what he had found (Tr. p. 83, ll. 10-14), and the supervisor in turn notified DMH's Public Safety office (Tr. p. 85, ll. 8-9). While Public Safety was inspecting the boxes of cash, Respondent, at the time an employee with DMH, approached the supervisor, asked what was happening, and after being told some money was found, stated the money was his own. (Tr. p. 163, l. 22 – p. 164, l. 1; p. 111, l. 2-3.) Public Safety officers and SLED agents advised Respondent of his *Miranda* rights and then interviewed him about the money. (Tr. p. 406, l. 1 – p. 407, l.1; p. 275, ll. 19-23.) Respondent provided a written statement stating the money was not his and stating he was holding the money on behalf of an acquaintance named Aaron Kennedy. (Tr. p. 410, l. 18 – p. 411, l. 5.)

According to Respondent, Aaron Kennedy called him around March of 2011, asked to come by Respondent's home, came by the home and asked Respondent to keep \$210,000.00 in cash for him until he got out of prison. (Tr. p. 165, ll. 2-13; p. 171, l. 16 – p. 177, l. 17.) Respondent describes Aaron Kennedy as a black male, about 6'2" tall, about 200 pounds, and around 40 years of age. (Tr. p. 407, ll. 18-25.) Respondent claims he knows Kennedy from talking with him at the race tracks every once in a while when they would run into each other and from going to a "restaurant or a bar or something like that after, had a beer, something like that." (Tr. 167, ll. 3-21.) Respondent believes Kennedy is from Hartsville, South Carolina, and thinks

he was in the concrete business. (Tr. p. 264, ll. 15-21.) Additionally, Respondent believes Kennedy was headed to prison for six to nine months in March of 2011. (Tr. p. 259, l. 1-25.) Aside from these descriptors, Respondent claims to know nothing else about Kennedy. (Tr. p. 248, l. 2 – p. 251, l. 7.)

Respondent cannot explain where Kennedy is now, or why Kennedy has not returned for his money. Respondent further cannot provide any friends or family of Kennedy, any contact information for Kennedy, or how Kennedy came by the \$208,700.00 in cash. (Tr. p. 262, l. 23 - p. 265, l. 12.) Respondent has made zero efforts to locate or contact Kennedy or any of his family or friends. (Tr. p. 262, l. 22 – p. 265, l. 24.) Unsure of when Kennedy would return for the money, Respondent does not have a plan for the cash except to deposit the funds in a safety deposit box. (Tr. p. 265, l. 25 – p. 266, l. 14.)

SLED agent Max Dorsey and FBI Agent Jason Greenan have attempted to locate Aaron Kennedy¹ by searching South Carolina's Department of Motor Vehicles (SCDMV) system, the South Carolina Department of Corrections' (SCDOC) online system, and the Federal Bureau of Prisons' (BOP) online system. (Tr. p. 411, ll. 2-19; p. 412, l. 2 – p. 414, 114; p. 446, l. 17 – p. 447, l. 21). When Lt. Dorsey checked SCDOC's and SCDMV's online system, he did not find anyone who met the description of Aaron Kennedy. (Tr. p. 412, l. 2 – p. 414, l. 14.)

Respondent claims never to have taken the cash out of the bags and to only know how much money was in the box based on hearsay from the alleged bailor. (Tr. p. 271, l. 20 – p. 272 l. 17.) Respondent admits there was nothing on the cash or the packaging that identified the cash or

¹ Respondent provided the spelling of Aaron Kennedy. Tr. p. 416, ll. 9 – 23; Exhibit A to Appellants Motion for Summary Judgment, Respondent's Written Statement.

money as his (Tr. p. 268, l. 13 – p. 270, l. 9). Respondent did not mark his name or contact information anywhere in the boxes or on the bags or on the cash. (Tr. p. 268, l. 13 – p. 270, l. 9.) Despite living with the mother of his three children, a woman he lived with for 15 years, and his three children at the time he allegedly possessed the money and despite claiming to have kept the \$208,700.00 in his home for about three weeks, Respondent never spoke to anyone about the cash and no one ever saw the cash (Tr. p. 251, l. 21 – p. 254, l. 23). Respondent has no photographs or documents referencing or showing the cash. (Tr. p. 269, ll. 1-2; p. 254, l. 24 – p. 255, l. 5.)

When the money was found on DMH property, DMH placed the money in a non-interest bearing account labeled Unclaimed Property Funds. (Court's Ex. 1, Stipulation.)

ARGUMENT

I. The Overwhelming Evidence Shows a Bailment Agreement Was Never Formed Between Respondent and Aaron Kennedy

Even when viewing the evidence in a light most favorable to Respondent, the only reasonable inference therefrom is that Aaron Kennedy does not exist and, therefore, there is no bailment agreement from which Respondent can claim a possessory interest in the money found on DMH property. And in order to maintain an action for conversion, Respondent must have the right to possess the alleged converted property. *Regions Bank v. Schmauch*, 354 S.C. 648, 667, 582 S.E.2d 432, 442 (Ct. App. 2003). The Court therefore erred when it denied Appellants' motion for a directed verdict (Tr. p. 336, l. 17 – p. 362, l. 2; p. 471, l. 19 – p. 493, l. 15), motion for a judgment notwithstanding the verdict, and motion for a new trial absolute.

“In ruling on motions for directed verdict and JNOV, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions and to deny the motions where either the evidence yields more than one inference or its inference is in doubt.” *Law v. S. Carolina Dep't of Corr.*, 368 S.C. 424, 434–35, 628 S.E.2d 642, 648 (2006) (citing *Jinks v. Richland County*, 355 S.C. 341, 345, 585 S.E.2d 281, 283 (2003)). “The appellate court will reverse the trial court's ruling on a JNOV motion only when there is no evidence to support the ruling or where the ruling is controlled by an error of law.” *Id.* (citing *Hinkle v. Nat'l Cas. Ins. Co.*, 354 S.C. 92, 96, 579 S.E.2d 616, 618 (2003)).

In order to maintain an action for conversion, “[t]he plaintiff must show either title or right to possession of the property at the time of conversion.” *Moore v. Weinberg*, 373 S.C. 209,

227, 644 S.E.2d 740, 749 (Ct. App. 2007) aff'd, 383 S.C. 583, 681 S.E.2d 875 (2009)(citing *Oxford Fin. Cos. v. Burgess*, 303 S.C. 534, 402 S.E.2d 480 (1991)). Conversion may arise by some illegal use, illegal misuse, or illegal detention of another's property. *Regions Bank v. Schmauch*, 354 S.C. 648, 667, 582 S.E.2d 432, 442 (Ct. App. 2003) (citing *Owens v. Andrews Bank & Trust Co.*, 265 S.C. 490, 496, 220 S.E.2d 116, 119 (1975)). And the conversion must come from a wrongful taking or detention. *Id.* (citing *Castell v. Stephenson Fin. Co.*, 244 S.C. 45, 50-52, 135 S.E.2d 311, 313 (1964)).

In this case, Respondent's sole claim for the right to possess the \$208,700 found on DMH property is derived from his alleged bailment agreement with a supposed Aaron Kennedy. Neither before nor during trial has Respondent ever claimed he himself owns the \$208,700. Rather, Respondent continued to maintain through closing argument that his possessory interest in the \$208,700 arose solely through his purported agreement with Aaron Kennedy. (Tr. p. 522, ll. 12-14.) Since Aaron Kennedy does not exist, then there is no factual basis upon which a jury could find that Respondent had a possessory interest in the \$208,700. The evidence offered in this case overwhelmingly shows that no bailment agreement between Respondent and Aaron Kennedy was ever formed and that Aaron Kennedy does not exist, and thus, the jury's verdict does not have a basis in fact.

The evidence of the existence of a bailment agreement between Respondent and a supposed Aaron Kennedy is limited to Respondent's testimony, and Respondent's testimony on this factual issue is not credible. Respondent is personally motivated to take possession of the \$208,700. Respondent offered no evidence apart from his self-serving testimony to support his

assertion that a bailment agreement was formed between himself and Aaron Kennedy. In fact, Respondent's description of how the alleged agreement was formed defies logic and undercuts his credibility on this contested factual issue.

According to Respondent, a casual social acquaintance by the name of Aaron Kennedy suddenly dropped by Respondent's house to ask him to hold \$210,000 in cash while Aaron Kennedy goes to prison for six to eight months. (Tr. p. 165, ll. 2-13; p. 171, l. 16 – p. 177, l. 17.) After Respondent learns that Aaron Kennedy is going to prison, Respondent is handed a cardboard box full of hundred dollar bills in crown royal bags but asks no questions about the origin of the money. (Tr. p. 243, l. 24 – p. 245, l. 18; p. 274, l. 22 – p. 275, l. 18.) The parties do not exchange contact information; they do not count the amount of the cash so that they both agree on how much Respondent is actually holding; there is no receipt drafted to reflect the alleged bailment; they do not discuss the origin of the money, the reason Aaron Kennedy is going to prison, or the prison that Aaron Kennedy is headed to; and there is no plan to reconnect once Aaron Kennedy gets out of prison. (Tr. p. 248, l. 2 – p. 250, l.12; p. 254, l. 24 – p. 256, l. 15; p. 258, l. 3 – p. 259, l. 25; p. 262, l. 23 – p. 265, l. 24; p. 274, l. 1 – p. 275, l. 18.) Moreover, simply by happenstance, Respondent never had Aaron Kennedy's phone number, but Aaron Kennedy had Respondent's phone number, and the one and only time that this supposed Aaron Kennedy called Respondent, Kennedy's phone number showed as unlisted. (Tr. p. 250, l. 16 – p. 251, l. 7.)

Additionally, in the four and a half years since this "Aaron Kennedy" allegedly dropped off \$208,700 in cash at Respondent's doorstep, Respondent has received no communication from Aaron Kennedy inquiring about the status of the money. (Tr. p. 263, l. 16 – p. 264, l. 9.)

Respondent has not had any visits or phone calls from Aaron Kennedy or anyone purporting to speak on his behalf even though Respondent has kept the same phone number and address (until just last year) and it is now four years past the time when Aaron Kennedy should have been out of prison. (Tr. p. 263, l. 16 – P. 265, l. 25.) Equally as puzzling is Respondent's testimony that he has made no effort whatsoever to locate Aaron Kennedy at any point in time. (Tr. p. 264, l. 22 – p. 265, l. 24.) Moreover, even though Respondent claims to have since seen friends of Aaron Kennedy's at the racetrack where they met, he has never inquired from these claimed friends about Aaron Kennedy's whereabouts. (Tr. p. 265, ll. 4 – 12.) When asked on cross-examination if he could provide *just one* name of a mutual acquaintance, Respondent testified he could not provide a single name. (Tr. p. 315, ll. 14 – p. 316, l. 1.)

Respondent's story of how he supposedly came into possession of the \$208,700 given to him by a person he could not later contact, knew very little about, cannot be located by law enforcement, and who has never shown up to inquire about the money in four and a half years is not credible. Common sense, life experience, and logic dictate this is not the way people behave when they enter agree to hold over \$200,000 in cash. The facts offered during trial by Respondent to prove the existence of a bailment agreement with Kennedy do not justify the jury's verdict finding that Respondent had possession of the \$208,700 based on an agreement with Aaron Kennedy. Because there is no credible evidence to support the ruling, this Court should reverse the trial court's ruling denying Appellants' motion for judgment notwithstanding the verdict or in the alternative grant a new trial.

II. The Trial Court Erred in Admitting Prejudicial Hearsay Testimony from Respondent on the Amount of Money

Furthermore, the Court erred when it permitted Respondent, over the objection of Appellant, to testify that he was told by Aaron Kennedy that the amount of money he received from Aaron Kennedy was \$210,000. Respondent, by his own admission, had no personal knowledge of the amount of money found on DMH property, and his statements concerning the amount of money involved were inadmissible hearsay. The trial court's ruling was significantly prejudicial because Respondent's statement on the dollar amount was the only piece of evidence connecting him to the funds found on DMH property by another DMH employee.

"The admission or exclusion of evidence is within the discretion of the trial court and will not be reversed on appeal absent an abuse of that discretion." *State v. Foster*, 354 S.C. 614, 620-21, 582 S.E.2d 426, 429 (2003) (citing *State v. Saltz*, 346 S.C. 114, 551 S.E.2d 240 (2001)). "An abuse of discretion occurs when the trial court's ruling is based on an error of law." *Id.* (citing *State v. McDonald*, 343 S.C. 319, 540 S.E.2d 464 (2000)). Hearsay is defined "as a statement, other than one made by the declarant while testifying at the trial . . . , offered in evidence to prove the truth of the matter asserted." SCRE 801(d). Where a declarant has no personal knowledge of what he testifies to and where the declarant's testimony is based only on statements made out of court by another, that testimony is hearsay and must not be admitted. *Deep Keel, LLC v. Atlantic Private Equity Group, LLC*, 413 S.C. 58, 71, 773 S.E.2d 607, 614 (Ct. App. 2015) ("We find Bynum's testimony was hearsay. Bynum had no personal knowledge of any transactions His testimony demonstrates his knowledge was based exclusively on documents [and] [b]y testifying to a conclusion based only on statements he read in documents, Bynum necessarily

testified to the truth of those statements. His testimony, therefore, was offered to prove the truth of the statements and was hearsay.”) If it was error to admit the evidence and Appellants are prejudiced by the admission of the evidence, this Court must reverse and order a new trial. *See Fields v. Regional Medical Center Orangeburg*, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005) (noting that to warrant reversal, appellant must prove the evidentiary ruling was erroneous and resulted in prejudice). In *Deep Keel*, this Court held that where the respondent could not have proven the amount remaining due on the debt at issue without the hearsay testimony, that evidentiary error was prejudicial to the appellant in the case. *Deep Keel*, 413 S.C. at 74, 773 S.E.2d at 615.

In this case, Respondent testified at trial that he had never counted the money found on DMH property (Tr. p. 271, ll. 20- p. 272, ll. 17), and the only reason that he stated the money was \$210,000 was because that is what he was allegedly told by Aaron Kennedy. (Tr. 272, ll. 6-9).

Q: So, you’ve had no personal knowledge of how much money was in that box aside from your claim that Aaron Kennedy told you?

A: Correct.

(Tr. 272, ll. 6-9).

Because Respondent had no personal knowledge of the amount of money and his testimony was elicited for the purpose of showing his knowledge of the money prior to it being counted by law enforcement, his testimony about the amount of cash was hearsay (Tr. p. 329, l. 20 – p. 330, l. 3). SCRE 801, 805. As hearsay, this testimony should have been excluded by the Court, and its admission was error.

Furthermore, the Court erred when it held that Aaron Kennedy's statement about the amount of money that he was handing to Respondent was a legally operative term. (Order pp.8-9.) Terms that have such legal significance are those that go to the essential terms of a contract such as an offer, acceptance, or consideration. Here, the total amount of the money Aaron Kennedy allegedly gave to Respondent did not constitute an essential term of the contract. While Respondent was supposedly going to earn some portion of money upon Aaron Kennedy's return, there is no evidence that it was based in some measure on the total amount of money that Respondent was holding. Had Respondent agreed to hold the money for a percentage of the total amount held, then perhaps the total amount of cash Aaron Kennedy entrusted to Respondent would be an essential term of the contract. As it is, Aaron Kennedy's alleged statement to Respondent that the total cash was \$210,000 was inadmissible hearsay because Aaron Kennedy was not brought in to testify, and Respondent admitted to having no independent knowledge of the amount of the money. Therefore, the Court erred when it admitted this testimony over Appellant's hearsay objection (Tr. p. 12, l.3 – p. 23, l. 14; p. 124, l.18 - 127, l. 13; 134, l. 21 – p. 144, l.16; p. 147, l.4 - p. 159, l.4; p. 171, l. 19-23; p. 174, ll. 23-p. 175, l. 1; p. 175, ll. 15-23; 336, l. 17 – p. 362, l. 2; p. 471, l. 19 – p. 493, l. 15).

Further, the trial court's error was fatal to Appellants' case because Respondent's hearsay testimony was used to show Respondent's alleged knowledge of the amount of the funds prior to those funds being found and counted on DMH property. As with the respondent in *Deep Keel*, without Respondent's hearsay testimony concerning the amount of the funds at issue, Respondent would not have been able to establish *any* connection to the funds found by another

employee on DMH Property. By allowing Respondent to testify to the amount of the funds, the trial court allowed the only piece of evidence that showed knowledge and connection to the funds found on DMH property. Without this hearsay testimony, the jury would not have had a single piece of evidence to suggest a connection between the money and Respondent.

The admission of this hearsay evidence prejudiced Appellants and justifies this Court reversing and granting a new trial.

III. The Law Does Not Allow the Court to Enforce a Verdict That Will Result in Respondent's Unlawful Possession of the Funds

The trial court should also have granted a judgment notwithstanding the verdict in favor of Appellants because the only reasonable inference from the evidence is that Respondent's possession of the funds at issue violates statutory law or public policy. Courts will not lend their assistance to carry out the terms of a contract that violates statutory law or public policy. *Ward v. West Oil Co., Inc.*, 387 S.C. 268, 274, 692 S.E.2d 516, 520 (2010).

Respondent's possession of over ten thousand dollars in cash without reporting it was in violation of one or more of the following state and federal laws:

S.C. Code Ann. § 12-54-44(B)(6)(c)

A person who: (i) willfully removes, deposits, or conceals, or is concerned in removing, depositing, or concealing goods or commodities for which a tax is or must be imposed, or property upon which levying is authorized pursuant to law, with intent to evade or defeat the assessment or collection of any tax imposed by this provision of law administered by the department is guilty of a misdemeanor . . .

26 U.S.C.A. § 6867(a)

If the individual who is in physical possession of cash in excess of \$10,000 does not claim such cash (1) as his, or (2) as belonging to another person whose identity the Secretary [of the Treasury or his delegate] can readily ascertain and who acknowledges ownership of such cash, then . . . shall be presumed that such

cash represents gross income of a single individual for the taxable year in which the possession occurs, and that the collection of tax will be jeopardized by delay.

18 U.S.C.A. § 1956(a)(3)

Whoever, with the intent (A) to promote the carrying on of specified unlawful activity; [or] to conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceed of specified unlawful activity; or to avoid a transaction reporting requirement under State or Federal law, conducts or attempts to conduct a financial transaction involving property represented to be the proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity” violates this money laundering statute.

S.C. Code Ann. § 44-53-475

Whoever, knowing the property involved in a financial transaction represent the proceeds of, or is derived directly or indirectly from the proceeds of unlawful activity relating to narcotics drugs or controlled substances, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds (a) with the intent to promote the . . . unlawful activity . . . or (b) knowing that the transaction is designed in whole or in part to conceal or disguise the nature, locations, sources, ownership, or control of the proceeds of the unlawful activity is guilty of a felony

S.C. Code Ann. § 16-13-180(A)

It is unlawful for a person to . . . receive, or possess stolen goods . . . if the person knows or has reason to believe the goods . . . [are] stolen.

In this case, even taking Respondent’s story as true, Respondent admitted he was asked to hold over \$200,000 in hundred dollar bills by a man who was about to serve a six to eight month prison sentence. (Tr. p. 330, l. 8 – p. 331, l. 24; p. 258, l. 3 – p. 259, l. 25.) As a result, Respondent took great pains to hide the cash from everyone to include his own family,² he did not pay taxes on the cash, he did not ask if taxes had been paid on that cash, and he did not ask about the source of the cash. (Tr. p. 273, l. 10 – p. 275, l. 18.)

² Respondent testified he told no one about this money (p. 253, l. 16– p. 254, l. 23); that despite keeping his own personal and business funds in bank accounts, he did not place this money in a bank account (Tr. p. 265, l. 25– p. 273, l. 9).

Moreover, the evidence suggested that Respondent's possession of \$208,700 was the result of illegal drug activity. (Tr. p. 276, l. 8 – 17; p. 314, l. 7 – p. 315, l. 13.) Agent Greenan testified the FBI was investigating Respondent and that he was familiar with Devin Sistrunk, a close friend of Respondent's who had gone to federal prison on drug charges. (Tr. p. 444, l. 13 – p. 446, l. 16; Defense Ex. 16 & 17.) Because Respondent gained possession of the \$208,700 through illegal drug activity, his possession is unlawful and cannot be enforced by this Court. The Court further should not and cannot enforce a contract or a verdict that would further Respondent's attempt to circumvent state and federal tax laws. As such, this Court should reverse the trial court's ruling on the JNOV. (Tr. p. 336, l. 17 – p. 362, l. 2; p. 471, l. 19 – p. 493, l. 15)

IV. The Trial Court Erred in Excluding Appellants' Requested Jury Charges

This Court should also reverse and order a new trial because the trial court erred in excluding jury charges on the state and federal tax statutes³ and the state statute prohibiting receiving stolen goods.⁴ (Tr. p. 362, l. 16 – p. 363, l. 18; p. 580, l. 19 – p. 581, l. 14; p. 561, l. 1 - p. 580, l. 17.) Respondent violated these statutes with his alleged contract and possession of the \$208,700 in cash.

³ S.C. Code Ann. § 12-54-44(B)(6)(c) (“A person who: (i) willfully removes, deposits, or conceals, or is concerned in removing, depositing, or concealing goods or commodities for which a tax is or must be imposed, or property upon which levying is authorized pursuant to law, with intent to evade or defeat the assessment or collection of any tax imposed by this provision of law administered by the department is guilty of a misdemeanor”); 26 U.S.C.A. § 6867(a) (“If the individual who is in physical possession of cash in excess of \$10,000 does not claim such cash (1) as his, or (2) as belonging to another person *whose identity the Secretary [of the Treasury or his delegate] can readily ascertain* and who acknowledges ownership of such cash, then . . . shall be presumed that such cash represents gross income of a single individual for the taxable year in which the possession occurs, and that the collection of tax will be jeopardized by delay.”).

⁴ S.C. Code Ann. § 16-13-180(A) (“It is unlawful for a person to . . . receive, or possess stolen goods . . . if the person knows or has reason to believe the goods . . . [are] stolen.”).

“An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court committed an abuse of discretion.” *Cole v. Raut*, 378 S.C. 398, 404, 663 S.E.2d 30, 33 (2008). “An abuse of discretion occurs when the trial court's ruling is based on an error of law or is not supported by the evidence.” *Id.* “A trial court must charge the current and correct law.” *Wells v. Halyard*, 341 S.C. 234, 237, 533 S.E.2d 341, 343 (Ct.App.2000). “In reviewing a jury charge for alleged error, an appellate court must consider the charge as a whole in light of the evidence and issues presented at trial.” *Fairchild v. South Carolina Dept. of Transp.*, 385 S.C. 344, 350, 683 S.E.2d 818, 822 (Ct. App. 2009) (citing *Halyard*, 341 S.C. at 237, 533 S.E.2d at 343). “Ordinarily, a trial [court] has a duty to give a requested instruction that correctly states the law applicable to the issues and evidence.” *Id.* (quoting *Fernanders v. Marks Constr. of S.C., Inc.*, 330 S.C. 470, 473, 499 S.E.2d 509, 510 (Ct.App.1998)). “However, jury instructions should be confined to the issues made by the pleadings and supported by the evidence.” *Id.* (citing *Baker v. Weaver*, 279 S.C. 479, 482, 309 S.E.2d 770, 771 (Ct.App.1983)). “To entitle an appellant to reversal, the trial court's instructions must be not only erroneous, but also prejudicial.” *Burroughs v. Worsham*, 352 S.C. 382, 392, 574 S.E.2d 215, 220 (Ct. App. 2002) (citing *Arkwright Mills v. Clearwater Mfg. Co.*, 217 S.C. 530, 61 S.E.2d 165 (1950)).

In *Muhleck v. Tamanini*, 271 S.C. 57, 60, 244 S.E.2d 535, 537 (1978), the Supreme Court reversed the lower court for its failure to charge a requested statute to the jury and held that where there is sufficient evidence to “create[] an inference” such that “the jury could have concluded” the plaintiff violated the statute, the court must charge the requested statute to the jury.

Here, on cross-examination, Respondent testified that while he claimed to be in possession of the over \$200,000 in cash, he never paid taxes on it and he did not discuss taxes with Aaron Kennedy and thus did not confirm that taxes had already been paid by Aaron Kennedy. Respondent also testified that despite maintaining bank accounts for his own personal and business funds, he elected not to put the \$208,700 in cash in a bank. Respondent testified that he believed Aaron Kennedy was headed to serve a prison sentence and he did not ask or discuss the source of the funds in any way. Respondent testified regarding the various efforts he went to in order to hide the location and existence of the money, even from his own family.

Like in *Muhleck*, there was sufficient evidence in this case to create an inference that Respondent violated state and federal tax statutes through his possession of the funds at issue and had reason to believe the cash was stolen in violation of the state receiving stolen property statute. The proposed charge was current and correct law and in light of the evidence and issues presented at trial, the trial court had a duty to give the requested instruction. Had the trial court charged the statutes as requested, the jury could have concluded Respondent violated those statutes and was thus not able to recover on a claim of conversion. The proposed charge directly addressed Appellants' affirmative defense of illegality and its exclusion was prejudicial to Appellants because there is no doubt the charge would have influenced the jury's verdict. Because the trial court erred by not including the requested statutes in the jury charges, this Court should order a new trial.

V. This Court Should Grant a New Trial Based on Prejudicial Statements Made by Respondent During Closing Arguments.

Alternatively, this Court should grant a new trial based on Respondent's improper closing argument characterizing Appellants as attempting to "pull[] one over on th[e] jury," (Tr. p. 534, l. 4 – 12.). "It is improper for counsel to make a closing argument to the jury . . . calculated to arouse passion or prejudice." *Branham v. Ford Motor Co.*, 390 S.C. 203, 234, 701 S.E.2d 5, 21 (2010) (internal quotations and citation omitted). Granting a new trial based on improper closing argument is justified where the objectionable statements serve only to inflame the passions of the jury and invite the jury to make its decision based on passion rather than reason, thereby denying the opponent of the improper closing argument a fair trial. *Id.* at 235, 701 S.E.2d at 22.

Here, Appellants were denied a fair trial when Respondent's counsel made the inflammatory and prejudicial statement during closing argument that if the jury decided in favor of Appellants, the attorneys for Appellants would want to "go out in that parking lot after this is all over and high five each other and say you know we pulled one over on that jury." (Tr. p. 534, ll. 5-7.) The trial court erred in finding Appellants did not preserve the issue by failing to contemporaneously object. (Order p. 9.) Not only did Appellants immediately object (Tr. p. 524, ll. 9-12), specifically stating what language the objection was meant to address, prior to closing arguments Appellants also asked the Court to be on notice based on prior conduct in the trial and to warn Respondent's counsel that statements meant to prejudice the jury in closing were not to be tolerated (Tr. p. 518, ll. 14 – p. 519, l. 2).

By making this prejudicial statement, the jury was led to believe that the state knew the truth about the origin of the money but was trying to illegitimately keep it by tricking the jury and

cheating Respondent out of his ownership. The sole purpose for this statement was to inflame and prejudice the jury and invite the jury to base its verdict on passion rather than reason. Once this statement was made, it could not be undone. There is no doubt this statement prejudiced the jury's verdict against Appellants. As such, the Court should grant a new trial based on these inflammatory statements made during closing argument.

CONCLUSION

For the reasons stated above, this Court should reverse the trial court's decision to deny Appellants' motion for a judgment notwithstanding the verdict and enter a verdict in favor of Appellants, or, in the alternative, reverse the trial court's decision to deny Appellants' motion for a new trial absolute, vacate the verdict, and order a new trial.

Respectfully submitted,

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